49. Moreover, MCI argues that we should ensure that qualifying carriers are able to obtain section 251 functionalities in infrastructure sharing arrangements at prices *lower* than those provided pursuant to the forward looking costs-derived prices for section 251 functionalities mandated by the *Local Competition First Report and Order*.[117] Accordingly, MCI urges the Commission to assert pricing authority to ensure that prices negotiated pursuant to section 259 arrangements are less than or equal to the interim proxy prices the Commission adopted in the *Local Competition First Report and Order*, "minus an average amount of common costs and a normal rate of return."[118] Beyond applying such an approach to those network features and functions otherwise available under section 251, MCI would also construe section 259(a) to include information services "and the facilities required to provide information services," subject to rejection only if the providing incumbent LEC demonstrates that it would, under the agreement, "have to provide access at prices lower than those consistent with the costing principles established in the First Report and Order in CC Docket 96-98."[119]

c. Discussion

50. We decline to adopt specific definitions of the "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that providing incumbent LECs must make available to qualifying LECs. We do so because we believe that such a flexible approach best ensures that qualifying carriers are able to obtain that public switched network infrastructure, technology, information, and telecommunications facilities and functions they require to meet their universal service obligations, now and in the future as technology continues to evolve. We also find no reason to exclude any facilities, functions, or information from the negotiations and agreements under section 259. Moreover, we note that section 259 establishes specific limitations on a qualifying LEC's use of a providing incumbent LEC's infrastructure under section 259. Specifically, a qualifying LEC may use section 259 to gain access to another LEC's infrastructure only "*for the purpose* of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 241(e)."[120] In addition, the providing incumbent LEC is not required to share facilities that will be used to offer service or access in the providing incumbent LEC's telephone exchange area.[121] As discussed below, other subsections of section

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[117] *Id.* at 9.

[118] *Id.* at 9. *But see* USTA Reply Comments at 6-7 (Congress intended unique treatment, distinct from Section 251, to qualifying carriers subject to universal service obligations; terms of Section 259 agreements may be -- but are not required to be -- more favorable than terms in Section 251 agreements).

[119] MCI Reply Comments at i. *But see* Southwestern Bell Reply Comments at 4 ("MCI ignores the distinction between 'what is eligible for sharing' versus 'to what use the infrastructure may be put.'").

[120] 47 U.S.C. § 259(a) (emphasis added).

[121] *See* Discussion at Section III. C. 6., *infra*.

259 establish further limitations on the scope of section 259. We expect that section 259 agreements will reflect these limitations.

51. We also find that adopting limitations in this Report and Order on the type of infrastructure that must be made available to qualifying carriers under section 259 could be inconsistent with the conclusions reached in the universal service docket. One requirement for becoming a qualifying carrier under section 259 is designation as an "eligible telecommunications carrier" under section 214(e) to receive universal service support.[122] The specific universal service mandates are currently being developed by the Commission and the states, and we cannot decide in the section 259 proceeding what requirements, if any, would best support the conclusions ultimately reached in the universal service proceeding. Further, because technology will continue to evolve, it is essential to ensure that the statutory purpose behind section 259 -- to provide qualifying carriers with specific opportunities to obtain infrastructure -- is not defeated by definitions that are restrictively based on perceptions of present network requirements. We also note that this approach is consistent with the Congressional mandate to eliminate market entry barriers for small businesses, in section 257 of the Act, because it enables small carriers to obtain access to advanced infrastructure that might otherwise be unavailable, for the purpose of providing telecommunications services and access to information services.[123]

52. We are also not persuaded that we should restrict the class of qualifying carriers to "small" carriers. Although the qualifying criteria set out in section 259(d)(1) and (2) would, as we stated in the NPRM, "appear to apply to many small LECs," those criteria speak for themselves and we do not believe that we should, in effect, prejudge what carriers -- or class of carriers -- can satisfy the criteria of section 259(d). As noted in Section III. E., *infra*, we have decided to adopt a rebuttable presumption that certain carriers meet section 259(d)(1) criteria as "lacking economies of scale or scope," but such a presumption will not operate to preclude any carrier from demonstrating to an incumbent LEC that it does, in fact, lack economies of scale or scope for section 259(d)(1) purposes. Moreover, we promote competitive entry by finding that qualifying carriers may include *any* carrier that is found to satisfy the requirements of section 259(d), i.e., not only incumbent LECs but, perhaps, also competitive carriers.[124] We have specifically considered the impact on small telecommunications companies of the flexible regulatory approach we adopt here to define the scope of the section 259(a) requirement. We find that a flexible approach that relies upon negotiation by parties will allow small companies to better negotiate section 259 agreements that respond to their individual requirements, with few regulatory burdens and none that are not explicitly required by the statute.

[122] *See* 47 U.S.C. § 259(d)(2).

[123] *See* 47 U.S.C. § 257.

[124] *See Universal Service NPRM; see also Joint Board Recommendation on Universal Service* (recommending eligibility criteria for carriers seeking universal service support). We note that the Commission must complete a proceeding to implement the Joint Board's recommendations on or before May 8, 1997.

53. We also find that nothing in the language of section 259(a), the legislative history, or the record in this proceeding persuades us that we should limit the class of providing incumbent LECs to carriers that are "adjacent" to qualifying carriers. Section 259(a), on its face, merely defines providing incumbent LECs pursuant to the definition of incumbent LEC set out in section 251(h).[125] Whether any specifically identified non-adjacent incumbent LEC may be required to provide any given element of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to a qualifying carrier will depend solely on the criteria set out in section 259(b), including the section 259(b)(1) prohibition against requiring incumbent LECs "to take any action that is economically unreasonable or that is contrary to the public interest."[126] We discuss the interpretation of section 259(b) at Section III. C., *infra*.

54. Regarding the relationship between sections 251 and 259, we first decide that qualifying carriers should be able to obtain section 251-provided network facilities and functionalities -- including lease arrangements and resale -- alternatively pursuant to section 251 or pursuant to section 259 (except to the extent precluded by section 259(b)(6)), or pursuant to both if they so choose. (As discussed below at Section C, we also declare that any element of "public switched network infrastructure, technology, information, and telecommunications features and functions" that is *not* provided for under section 251 may be obtained pursuant to section 259.) Nothing in the statutory language of section 259 or its legislative history demonstrates that Congress intended to exclude section 251-provided interconnection elements from section 259 arrangements.

55. Section 259(a), on its face, broadly includes all "public switched network infrastructure, technology, information and telecommunication facilities and functions."[127] At the same time, as the Commission stated in the *Local Competition First Report and Order*:

> The purpose and scope of section 259 differ significantly from the purpose and scope of section 251. Section 259 is a limited and discrete provision designed to bring the benefits of advanced infrastructure to additional subscribers, in the context of the pro-competitive goals and provisions of the 1996 Act.[128]

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[125] *See* 47 U.S.C. §§ 251(h), 259(a).

[126] *See* 47 U.S.C. § 259(b)(1).

[127] *See* 47 U.S.C. § 259(a).

[128] *Local Competition First Report and Order* at ¶ 169 (footnote omitted).

The restrictions on the scope of section 259 are explicitly stated in the statute. They include the "purpose" clause in section 259(a) previously cited in paragraph 49, *supra*[129]; the limitation imposed pursuant to section 259(b)(6); and the qualifying criteria set out in section 259(d). We conclude that the negotiation-driven approach to regulation we adopt here will promote universal service in areas that in many cases, at least initially, will be without competitive service providers, and, at the same time, will not serve to inhibit the development of competition in any market.

56. To this end, we construe the language in section 259(b)(6) at Section III. C. 6., *infra*. Here it is enough to note that our interpretation of the "reach" of section 259(b)(6) is that it does not provide an invitation to insulate any telecommunications service areas -- including rural areas -- from competitive entry. We agree with ALTS and USTA, among others, that the only competitive significance of section 259(b)(6) is that qualifying carriers are allowed to use section 259 in certain specifically limited circumstances and may avail themselves of section 251 in all circumstances.

57. Further, given the express statutory limitations imposed pursuant to the use clause in section 259(a) and pursuant to the qualifying criteria in section 259(d), a proper understanding of the role of section 259(b)(6), and the filing requirement imposed by section 259(b)(7), we reject as unnecessary the approaches urged upon us by NCTA and MCI to conform our interpretation of section 259 to the section 251-driven carrier obligations in the *Local Competition First Report and Order*. Moreover, we do not believe that these approaches are contemplated by the language or the legislative history of section 259.

58. Specifically regarding NCTA's position,[130] we conclude that there is no manifest intent, evidenced in either the statutory language or the legislative history of section 259, to suggest that we can or should force providing incumbent LECs to provide infrastructure sharing to competitive LECs who do not independently qualify under the criteria established in section 259(d). Moreover, to the extent that ALTS argues that we should order providing incumbent LECs to provide elements of infrastructure sharing-negotiated arrangements to non-qualifying carriers pursuant to the pricing standards imposed by section 251, we find that this requirement would not comport with our interpretation of the limitations in section 259(a)[131] and (b)(6).[132] Stated another way, although providing incumbent LECs are fully subject to section 251

[129] 47 U.S.C. § 259(a) ("*for the purpose* of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 241(e).")

[130] NCTA Comments at 5-6 (arguing that, in certain situations, a non-qualifying competitive LEC should be able to obtain infrastructure from a providing incumbent LEC pursuant to section 259).

[131] *See* Discussion at Section III. B. 1 at ¶ 50.

[132] *See* Discussion at Section III. C. 6., *infra*.

interconnection obligations, we determine that section 259 establishes an alternative and separate means by which such carriers may be required to provide, to a narrowly defined class of qualifying carriers, *inter alia*, unbundled network functionalities, resale, and interconnection. We further determine that, pursuant to restrictions in section 259(b)(3) and (b)(6), such providing incumbent LECs shall not be required to provide such section 259 arrangements to non-qualifying carriers, to non-carriers, or to qualifying carriers that will use those functionalities to provide service in the providing incumbent LEC's telephone exchange area. Providing incumbent LECs are, however, fully required to provide functionalities, resale, and interconnection pursuant to requirements imposed by section 251.

59. In addition, we conclude that a qualifying carrier that obtains, pursuant to section 259 arrangements, interconnection, unbundled network elements, and other telecommunications functionalities otherwise available pursuant to section 251, is not released from its section 251-derived obligation to provide interconnection to competitive LECs. Thus, we find that there is no warrant in the language of section 259 to impose any section 259-specific common carrier requirements on qualifying carriers *vis-a-vis* possible competitive LEC requests for interconnection, *i.e.*, outside of the scope of obligations we have already imposed pursuant to section 251. We do not think NCTA's proposals to impose section 259-specific common carrier requirements on qualifying carriers pursuant to their dealings with competitors are necessary to remedy any potential anticompetitive results that might be caused by the operation of specific section 259 arrangements. As noted previously, express limitations in section 259(a) and (d) limit the scope and applicability of infrastructure arrangements, which arrangements may, nevertheless, be negotiated by any carrier who meets the qualifying criteria set out in section 259(d). Further, section 251 already imposes interconnection requirements on all carriers except those carriers who qualify for exemption, suspension, or modification pursuant to section 251(f). We anticipate that section 259 agreements, as a result, could enhance the ability of qualifying carriers that are incumbent LECs to meet their section 251 obligations. Whether carriers who otherwise obtain infrastructure pursuant to section 259 arrangements -- including elements otherwise available pursuant to section 251 -- can maintain their exemption, suspension, or modification under section 251(f) should be decided by the appropriate state commission on a case by case basis. We believe that making clear that we will enforce the section 251-derived interconnection rights of competitive LECs will help ensure that competitive entry into markets served by qualifying carriers markets is not hampered by the operation of otherwise valid section 259 arrangements. Additionally, all section 259 arrangements must be publicly filed pursuant to section 259(b)(7).[133] If, contrary to our expectations, any of these arrangements tends to establish competitive entry barriers, there will be ample opportunity for complaining parties, including competitive LECs -- or the Commission -- to investigate and to take appropriate action. We note that Congress apparently considered but refused a proposal to exempt section 259 arrangements from the

[133] 47 U.S.C. § 259(b)(7). *See also* Discussion at Section III. C. 7., *infra*.

application of the antitrust laws.[134] We further note that there is ample authority granted to the Commission pursuant to Title II to set aside any carrier agreements that are found to violate the public interest.[135]

60. We also reject MCI's suggestions as unsupported by the statutory language and legislative history of section 259 and otherwise unnecessary to secure the benefits of section 259 for qualifying carriers. As noted, MCI asserts that section 259 pricing requirements must be established by the Commission in relation to those section 251-derived pricing guidelines set out in the *Local Competition First Report and Order* or qualifying carriers (and others) will not receive the benefits that Congress intended. We find, however, nothing in either the express statutory language of section 259 or its legislative history that persuades us that Congress intended any particular price outcome at all pursuant to the negotiation-driven regime contemplated by section 259. Rather, we think that the statutory language evidences a belief that the parties to section 259 negotiations are best able to determine what suits their requirements, subject to certain explicitly stated statutory limitations. We discuss the necessity for pricing rules or guidelines more fully at Section III. C. 4., *infra*.

2. Intellectual Property and Information Issues

a. Background

61. We asked a variety of other questions about the meaning and scope of the language of section 259(a).[136] We noted that each element of public switched network infrastructure, technology, information, and telecommunications facilities and functions made available pursuant to section 259 might pose unique questions and issues for this proceeding. For example, we asked whether technology sharing would require mandatory patent licensing to qualifying carriers so that these carriers can develop equipment or software that is fully interoperative with proprietary systems (if any) deployed by an incumbent LEC. In cases where licensed technology is the only means to gain access to facilities or functions subject to sharing

[134] *See* S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., at 34 (1996). *See also* L. Sullivan, *Antitrust* 125-126 ("The notion that one possessing a scarce resource must exploit it in ways which entail no arbitrary or invidious distinctions among customers is an ancient one . . . . A firm which holds a lawful monopoly . . . [may] be guilty of monopolization if it exploits that resource in ways which exclude or disadvantage customers arbitrarily or invidiously." (citing, *e.g.*, *United States v. Terminal R.R. Association*, 224 U.S. 383, 32 S.Ct. 507 (1912); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416) (1945). *And see United States v. Associated Press*, 326 U.S. 1, 65 S.Ct. at 1422 ("The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common pool which is bound to reduce their competitors opportunity to buy and sell . . . ."); *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified . . . . We squarely held that this right was not unqualified." (citing *Lorain Journal v. United States*, 342 U.S. 143 (1951)).

[135] *See, e.g.*, 47 U.S.C. § 211.

[136] NPRM at ¶ 15-16.

requirements, we tentatively concluded that section 259 requires mandatory licensing, subject to the payment of reasonable royalties, of any software or equipment necessary to gain access to the shared capability or resource by the qualifying carrier's equipment.[137]

62. We also sought comment on what types of information must be made available to qualifying carriers by incumbent LECs pursuant to section 259(a). We asked whether marketing or other proprietary business information should be found to be included. We asked whether the information sharing mandated by section 259(a) implies any sort of joint network planning requirement.[138] Specifically, we asked whether section 259(a) requires incumbent LECs to make network information databases (other than those already required to be made available pursuant to section 251(c)(3)[139]) available to qualifying carriers and, if so, how? We sought comment on whether and how network information made available pursuant to section 259(a) might vary from that type of information to be disclosed under section 251(c)(5), which requires reasonable public notice of changes in the information necessary for transmission and routing of services using the incumbent LECs' facilities or networks.[140]

b. Comments

63. The majority of the commenters, *i.e.*, larger LECs and Octel, which address the protection of proprietary information and other intellectual property rights, raise concerns about the Commission's tentative conclusions in the NPRM.[141] Several parties reject the Commission's tentative conclusion to require mandatory licensing in certain situations.[142] A number of the larger LECs and USTA comment that patent licensing is not needed for infrastructure sharing.[143] Other parties, such as Southwestern Bell, argue that, because incumbent LECs' networks are built upon licenses to use intellectual property, "the sharing of any intellectual property must be conditioned upon the qualifying carrier obtaining a sufficient license from parties that have a

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[137] NPRM at ¶ 15.

[138] NPRM at ¶ 16.

[139] *Local Competition First Report and Order* at ¶¶ 452-503.

[140] 47 U.S.C. § 251(c)(5).

[141] *See, e.g.*, Octel Comments at 3; NYNEX Comments at 13; Southwestern Bell Reply Comments at 11-12; Octel Reply Comments at 1-4.

[142] *See, e.g.*, GTE Comments at 6 ("In some cases, [GTE] would not be permitted to license such technology."); Sprint Comments at 5; Southwestern Bell Reply Comments at 11-12.

[143] *See* NYNEX Comments at 12-13; Southwestern Bell Comments at 5-9; GTE Reply Comments at 5; USTA Comments at 5. *See also* Sprint Reply Comments at 5 ("infrastructure sharing can be accomplished through service agreements").

[protectable] interest in such property."[144] Southwestern Bell argues that there is no authority in section 259 for the Commission to "override any party's intellectual property rights, or the binding legal obligations of incumbent LEC[s]."[145]

64. Octel, a supplier of voice processing systems to government and businesses, including the larger LECs, argues that the property rights of third party providers that have licensing agreements with providing incumbent LECs should not be injured by the section 259-imposed sharing obligations placed on incumbent LECs.[146] Octel notes that the Commission's tentative conclusion about mandatory licensing is limited to those situations where licensed technology is "the *only means* to gain access to facilities or functions subject to sharing requirements."[147] Beyond those limited situations where mandatory licensing may be required, Octel argues that the Commission should not displace the commercial licensing process.[148] Octel maintains that, to the limited extent that the Commission might approve mandatory licensing, it should be subject to the proprietary information restrictions in third party providers' licensing schemes.[149]

65. A few parties, particularly RTC and AT&T, argue that proprietary information should be made available to qualifying carriers unconditionally.[150] RTC supports the Commission's tentative conclusion to require mandatory licensing, subject to reasonable royalties, where necessary to gain access to a shared capability or resource by the qualifying carrier's equipment.[151] AT&T contends that "[incumbent LECs] that have obtained the right to use software generics from their switching vendors are entitled to use those facilities to serve not only their own traffic, but also to serve qualifying carriers that share the incumbent carriers' infrastructure under Section 259 without any additional costs or fees."[152] In fact, according to

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144 Southwestern Bell Comments at 5. *Cf.* NYNEX Comments at 13; Sprint Comments at 5.

145 Southwestern Bell Comments at 7; *see also* Southwestern Bell Reply Comments at 11-12.

146 Octel Comments at 1-4; Octel Reply Comments at 1-4. Octel explains that its licensing agreements allow LECs access to a wide variety of proprietary information that is subject to strict nondisclosure arrangements. Octel Comments at 2.

147 Octel Comments at 3.

148 Octel Comments at 3 n.5 ("Given the availability of voice processing technologies . . . a qualifying carrier ought to purchase such service from Octel or another vendor independently of its sharing agreement with an incumbent LEC . . . .").

149 Octel Comments at 3.

150 RTC Comments at 6; AT&T Comments at 2 n.2; AT&T Reply Comments at 5.

151 RTC Comments at 6.

152 AT&T Comments at 2 n.2.

AT&T, "[i]f qualifying carriers were required to negotiate licensing agreements with all of an [incumbent LEC's] equipment vendors, none of which have any incentive to negotiate reasonable terms or to act expeditiously with a small, rural carrier, it is reasonable to assume that the carrier's ability actually to use the [incumbent LEC's] infrastructure to serve its customers will be seriously impeded."[153] RTC comments that, in some cases, joint network planning will be required to implement sharing obligations.[154]

66. Some commenters specify that marketing information should not be included within the scope of section 259(a).[155] For example, PacTel and GTE contend that marketing information would not facilitate infrastructure sharing because it only relates to the providing incumbent LEC's customer base.[156] USTA would except intellectual property and marketing information, but asserts that "[o]ther *public* information owned by the providing LEC . . . necessary for a [qualifying carrier] to provide services to its customers using the shared infrastructure, technology or telecommunications facilities, would plainly fall under the scope of Section 259."[157] Without further specification, RTC argues that there may be databases that are necessary for a qualifying carrier to fully benefit from the sharing arrangement beyond that which an incumbent LEC is required by section 251(c)(3) to provide competitors.[158] PacTel argues that, where proprietary information is necessary for the qualifying carrier to provide telecommunications services to its customers, it should be provided pursuant to nondisclosure agreements.[159]

c. Discussion

67. As described above,[160] the negotiation-oriented framework we have decided to adopt in defining the scope of section 259(a) obviates the need to define specifically what is included in the "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that incumbent LECs must make available to

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[153] AT&T Reply Comments at 5 (footnote omitted). As an example, AT&T cites to a dispute between itself and Southwestern Bell over licenses and right-to-use agreements in an interconnection proceeding before the Public Utility Commission of Texas. AT&T Reply Comments at 5-6 n.12. *See also* RTC Comments at 6 ("A providing carrier cannot be permitted to refuse to license a patent as grounds for avoiding its obligations under Section 259.").

[154] RTC Comments at 7. *But cf.* GTE Reply Comments at 12; PacTel Comments at 9.

[155] *See, e.g.* GTE Reply Comments at 5-6; Southwestern Bell Comments at 9-10; Sprint Comments at 4.

[156] GTE Reply Comments at 6. *See also* PacTel Comments at 8-9.

[157] USTA Comments at 6.

[158] RTC Comments at 7.

[159] PacTel Comments at 8-9. *See also* Octel Comments at 3-4.

[160] *See* Discussion at Section III. B. 1., *supra.*

qualifying carriers. We are persuaded that an approach that attempts to identify discrete elements -- or even examples -- of public switched network infrastructure, technology, information, and telecommunications facilities and functions would tend to defeat the legislative purpose which is to better ensure that qualifying carriers have access to evolving technology. As we noted above, we conclude that the language in section 259(a) that requires section 259 arrangements be made available "for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services" acts as a limitation on the scope of information available under section 259.[161] It is reasonable to assume that certain types of information could be found to be remotely connected, at best, to advancing this stated purpose of section 259.[162] We have decided, nevertheless, not to exclude, *per se*, any type of information or information service from the negotiation process.

68. The very flexibility of our approach to defining the scope of section 259(a), however, would seem to exacerbate those disagreements between commenters about intellectual property issues, specifically, where otherwise protectable intellectual property is owned or controlled by incumbent LECs and is properly sought by qualifying carriers. There is, for example and as we have noted, sharp disagreement between larger LECs and Octel, on the one hand, and smaller LECs and other parties, on the other hand, about the scope of necessary protection for such proprietary information. The larger LECs and Octel appear to suggest that the possession of proprietary information, including information licensed from third parties like Octel, necessitates a Commission decision that imposes restrictions on the sharing of such information. According to these commenters, unless such information is provided to qualifying LECs pursuant to separately negotiated agreements or to restrictive non-disclosure clauses in section 259 agreements, the result will force incumbent LECs to breach their contracts with third parties.[163] Smaller LEC commenters and their representatives, on the other hand, essentially argue that the restrictions proposed by the larger LECs would defeat the effectiveness of section 259 and, in effect, allow incumbent LECs to avoid their section 259 obligations altogether in many cases.[164]

69. We affirm our tentative conclusion that, whenever it is "the *only means* to gain access to facilities or functions subject to sharing requirements,"[165] section 259 requires the providing LEC to seek, to obtain, and to provide necessary licensing, subject to reimbursement for or the payment of reasonable royalties, of any software or equipment necessary to gain access to the shared capability or resource by the qualifying carrier's equipment. In the ordinary course

[161] *See* 47 U.S.C. § 259(a).

[162] *See* 47 U.S.C. § 259(a). *See also* RTC Comments at 6-7.

[163] *See, e.g.*, Southwestern Bell Comments at 5-9. *See also* Sprint Comments at 5.

[164] *See, e.g.*, RTC Comments at 6. *See also* AT&T Reply Comments at 3-6.

[165] *NPRM* at ¶ 15 (emphasis added). *See also* Octel Comments at 3.

of providing "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to qualifying carriers, we fully anticipate that such licensing will not be necessary.[166] We believe that, as suggested by AT&T and Sprint. infrastructure sharing can be accomplished through the use of agreements whereby providing incumbent LECs who own or lease certain types of information or other intellectual property provide functionalities and services to qualifying carriers without the need to transfer information that is legitimately protectable.[167]

70. We expect that the same process will occur in the context of negotiating section 259 agreements. At any rate, we agree with AT&T and RTC that providing incumbent LECs may not evade their section 259 obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate -- or allow -- provision of certain types of information to qualifying carriers. Therefore, we decide that the providing incumbent LEC must determine an appropriate way to negotiate and implement section 259 agreements with qualifying carriers, *i.e.*, without imposing inappropriate burdens on qualifying carriers. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly. We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs. We merely require the providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section 259.

71. Regarding RTC's comments on the provision of network information databases (other than those already required to be made available pursuant to section 251(c)(3)) to qualifying carriers, we conclude that there is no independent network information disclosure requirement set out in section 259(a). Similarly, we determine that Section 259(a) infrastructure sharing requirements are independent of current disclosure requirements, or any that the Commission may hereafter adopt, pursuant to Section 251.[168] Network information disclosure to qualifying carriers is properly the subject of section 259(c). As a result, we discuss commenters' positions on information disclosure and decide these issues in Section III. D., *infra*.

3. Dispute Resolution, Jurisdiction, and Other Issues

a. Background

[166] *See, e.g.*, GTE Reply Comments at 5; USTA Comments at 5-6.

[167] AT&T Reply Comments at 4-5 ("the qualifying carrier will purchase the use of the [incumbent LEC's] facilities and services -- in the same manner that carriers have historically done -- without acquiring access to embedded intellectual property"); Sprint Comments at 5; Sprint Reply Comments at 4-5.

[168] *See, e.g.*, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order, CC Docket No. 96-98, FCC 96-333, 11 FCC Rcd 15499 (rel. August 8, 1996) (*Local Competition Second Report and Order*). *See also* Discussion at Section III. B. 1., *infra*.

72. In the NPRM, we stated our general belief that rules implementing section 259(a) should be definitive enough so as to minimize disputes between or among the parties to section 259 agreements, but not so restrictive as to inhibit the Commission's ability to act flexibly to resolve disputes that may arise. We asked how best to achieve these goals, particularly given our tentative preference that section 259-derived arrangements should be largely the product of private negotiations among parties.[169] Regarding possible disputes between parties to section 259 agreements, we noted that section 259(d) defines qualifying carriers based on decisions made by the Commission and the states. We asked whether this joint responsibility has implications for deciding who should resolve section 259 disputes.[170]

73. The express language of section 259(a), on its face, grants the Commission sole authority to create rules to implement this section.[171] We tentatively concluded that section 259, by its express terms, pertains to both interstate and intrastate communications.[172] Further, we tentatively concluded that section 259 contemplates that the states may accept for public inspection the filings of section 259 agreements that are required by section 259(b)(7), and that they have authority to designate eligible carriers under section 214(e), as referenced in section 259(d)(2). We sought comment on each of these tentative conclusions. To ensure a complete record, we also asked whether the Commission has authority to preempt state regulation under *Louisiana Public Service Commission v. FCC*, in the event that section 259 does not apply to intrastate services, contrary to our tentative conclusion.[173]

74. Finally, we noted that, while section 259(a) refers to carriers that have "*requested* and obtained designation . . ."[174] as section 214(e)-eligible carriers, section 214(e) also provides that a state commission may designate a carrier as eligible on its own motion without a request,[175] and that the states, with respect to intrastate services, and the Commission, with respect to interstate services, shall designate a carrier as an eligible carrier to provide service in unserved areas.[176] In light of this provision, we asked whether we can and should adopt regulations to impose section 259(a) requirements on incumbent LECs in cases where the state has designated

[169] NPRM at ¶ 17.

[170] NPRM at ¶ 17.

[171] 47 U.S.C. § 259(a) ("*The Commission shall prescribe* . . . ." (emphasis added)).

[172] NPRM at ¶ 18.

[173] NPRM at ¶ 18. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) (*Louisiana PSC*).

[174] 47 U.S.C. § 259(a) (emphasis added).

[175] 47 U.S.C. § 214(e)(2).

[176] *See* 47 U.S.C. § 214(e)(3).

a qualifying carrier as an eligible carrier pursuant to section 214(e) but where the carrier did not request such designation.[177]

b. Comments

75. Most commenting parties, including RTC and USTA, support the Commission's tentative conclusion that "the best way for the Commission to implement section 259, overall, is to articulate general rules and guidelines."[178] Consistent with that approach, the majority of commenters suggest that flexible rules that promote cooperation and negotiation among providing and qualifying carriers would be more useful than detailed rules that attempt to predict all possible disputes.[179] For example, GTE argues that "[d]etailed, inflexible rules would discourage cooperation and prevent carriers from developing arrangements that meet unique needs."[180] The Minnesota Coalition states that "[t]he adoption of definitive rules would be at odds with the reliance upon negotiations as the primary vehicle for implementing infrastructure sharing."[181] Several parties comment that there is an extensive history of useful interconnection agreements between non-competing carriers that were reached without national rules.[182] For example, RTC suggests that "[m]any of the qualifying carriers under Section 259 will be independent LECs that have been successfully negotiating mutually beneficial sharing arrangements for more than 100 years with virtually no federal government intrusion."[183]

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[177] NPRM at ¶ 19.

[178] RTC Comments at 11 (urging the Commission not to adopt detailed rules "in the absence of a demonstrated need"); USTA Comments at 3-4. *See also* BellSouth Comments at 2; Minnesota Coalition Comments at 8; Sprint Reply Comments at 2.

[179] Ameritech Comments at 3; Minnesota Coalition Comments at 9 ("[w]hile definitive rules might minimize disputes, they would also minimize opportunities for parties to craft arrangements that are appropriate for their specific circumstances"); RTC Comments at 11; USTA Comments at 3-4 ("regulations attempting to establish rules for all possible disputes that may later arise are counterproductive").

[180] GTE Comments at i. *See also* Castleberry Telephone Company *et al.* Comments at i ("reducing government involvement is key to success"); Southwestern Bell Reply Comments at 2.

[181] Minnesota Coalition Comments at 9. *See also* NYNEX Reply Comments at 8-9 ("FCC should avoid micro-managing this area with stringent, prescriptive rules"); US West Comments at 3 ("the Commission's regulatory structure implementing Section 259 should be minimalist in nature").

[182] *See, e.g.*, Southwestern Bell Reply Comments at 1-2.

[183] RTC Comments at 3. *See also* Sprint Reply Comments at 2 (concurring with RTC); USTA Comments at 1-2.

76. In contrast, MCI and NCTA envision a more detailed structure to implement section 259.[184] MCI urges that Commission to adopt national rules to make unbundled elements available pursuant to Part 51 of the Commission's rules as a lower bound standard for qualifying carriers to obtain access to infrastructure under section 259.[185] Similarly, NCTA recommends that the rules adopted under section 259 should be conformed to the requirements of section 251 and should include sufficient safeguards to prevent anticompetitive behavior by incumbent LECs.[186]

77. There was near universal support among the commenting parties that the Commission need not adopt new procedures for resolution of disputes arising under section 259.[187] For example, MCI agrees: "It is reasonable for the Commission to rely on informal consultations between the parties and the Commission and, if necessary, existing declaratory ruling procedures and the . . . complaint process, including settlement negotiations and alternative dispute resolution."[188] A number of parties suggest that state commissions should also be available to resolve disputes under section 259, including the Minnesota Coalition which argues that states should be the primary forum for section 259 disputes.[189] Only USTA responded to the Commission's question about whether the joint responsibility reflected in section 259(d) -- the Commission's role concerning economies of scale or scope in subsection (d)(1) and the states' role in designating eligible carriers in subsection (d)(2) -- has implications for who should resolve section 259 disputes. According to USTA, the joint responsibility in section 259(d) indicates that disputes should be resolved according to "the jurisdictional nature of the service to be provided using the facilities, technology or information to be shared."[190]

78. Numerous parties comment that sharing agreements per section 259 may be used to provide interstate and intrastate communications.[191] Among those parties to directly address

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[184] MCI Comments at 3-6; NCTA Comments at 2-7. *See also* Octel Reply Comments at 4 (urging the Commission to adopt rules to protect proprietary information); AT&T Comments at 2 n.2 (recommending the Commission "carefully tailor its definition of facilities and information subject to sharing").

[185] MCI Comments at 4.

[186] NCTA Reply Comments at 1-3.

[187] *See, e.g.*, RTC Comments at 7; USTA Comments at 3-4; PacTel Comments at 9; NYNEX Comments at 15.

[188] MCI Comments at 10.

[189] Minnesota Coalition Comments at 12. *See also* GTE Comments at 18 ("If any difficulties do arise, the Commission's and state public utility commissions' complaint processes will be available."); Oregon PUC Comments at 3 ("States retain jurisdiction over the exact terms and conditions of the contracts . . . *for intrastate facilities and functions* . . . ."); PacTel Comments at 9 ("The Commission or state regulator should become involved only if parties are unable to reach agreement.").

[190] USTA Comments at 10.

[191] *See, e.g.*, US West Comments at 12-13; USTA Comments at 10; GTE Comments at 12.

the question of jurisdiction, the majority concur that section 259 contemplates a dual jurisdictional scheme in which the Commission and the states share authority. For example, GTE asserts that "[a]lthough it is true that Section 259 requires the Commission to adopt certain rules regarding infrastructure sharing, the states retain authority to regulate the intrastate aspects of infrastructure sharing arrangements . . . ."[192] USTA, similarly, states that "[s]ection 259(a) is not an omnibus grant of authority over intrastate services to the Commission, only a directive to enact regulations to govern the obligations of [providing incumbent LECs] to share facilities and functions."[193] A number of parties contend that section 259 does not in any way alter the traditional limits on Commission jurisdiction codified in section 2(b).[194] In comments that are generally representative of these parties, Southwestern Bell articulates a view of the jurisdictional scheme in which:

> [J]urisdiction must be determined on a dispute-by-dispute basis, with the location of [the] sharing LEC, the infrastructure, and the interstate/intrastate jurisdiction of its use determining the proper forum for a specific dispute.[195]

Some of these parties seem to distinguish between jurisdiction over infrastructure sharing agreements as used to provide intrastate services, as opposed to the more narrow issue of jurisdiction over intrastate services, *per se*.[196] Other parties cite the language of section 259(b)(7) as evidence that Congress intended for the Commission and the states to share jurisdiction over infrastructure sharing arrangements.[197]

79. In contrast, several parties expressly indicate that section 259 grants the Commission plenary authority over infrastructure sharing under the Act.[198] NCTA agrees with

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[192] GTE Comments at 12 (citing sections 2(b) and 261(b)); GTE Reply Comments at 6.

[193] USTA Comments at 9-10.

[194] USTA Comments at 10 ("Section 259 does not eliminate Section 2(b) from the Act, nor does it provide explicit and unambiguous authority over intrastate services."); GTE Comments at 12; PacTel Comments at 5-6.

[195] Southwestern Bell Comments at 10. *See also* USTA Comments at 10-11; GTE Comments at 12.

[196] USTA Comments at 9-10 (arguing that the Commission does not have authority over intrastate services "or disputes associated with the provision of such services"); Oregon PUC Comments at 3 ("States retain jurisdiction over the exact terms and conditions of the contracts formed under the FCC's rules and guidelines for intrastate facilities and functions, and they [also] retain jurisdiction over rate setting for intrastate facilities and functions.").

[197] *See, e.g.*, GTE Reply Comments at 6 (section 259(b)(7) "demonstrates that Congress expected the states to oversee the implementation of infrastructure sharing agreements under the Commission's guidelines"); Oregon PUC Comments at 2. *See also* Minnesota Coalition Comments at 12.

[198] US West Comments at 12; NCTA Comments at 7-8; *and see* RTC Comments at 7-8. *See also* MCI Comments at 10. While MCI does not explicitly address the question of jurisdiction, it advocates the adoption of rules similar to those adopted in the *Local Competition First Report and Order*, apparently suggesting a jurisdictional

the Commission that "[T]he Act 'grants the Commission sole authority to create rules to implement' Section 259 and that such rules would pertain to 'both interstate and intrastate communications.'"[199] NCTA argues that nothing in section 2(b) limits the Commission's jurisdiction with respect to the implementation of infrastructure sharing.[200] US West reasons:

> We perceive that public switched network infrastructure made available pursuant to Section 259 will consist of facilities and services used by the qualifying carrier to provide both interstate and intrastate services. These services of the qualifying carrier will be subject to regulation by the appropriate jurisdiction. There is no reasonable way to separate these facilities at the level of the transaction between the qualifying carrier and the incumbent LEC. The *Notice*'s analysis is correct.[201]

With respect to the Commission's authority under *Louisiana PSC*, PacTel advises that preemption is limited to those situations where "inconsistent state regulation frustrates federal policy."[202] RTC comments that the Commission's preemption powers are limited; for example, the Commission could not preempt a state's designation of an eligible telecommunications carrier per section 214(e).[203]

80. Both USTA and RTC agree that the Commission should require providing incumbent LECs to enter into sharing agreements with any requesting carrier that meets the requirements of section 259(d), regardless of whether the carrier *requested* designation as an eligible telecommunications carrier under section 214(e) or the state designated the carrier on its own motion.[204] USTA argues that "[t]he universal service goals of Section 259 would be best served by determining that Section 259 obligations apply to a [providing incumbent LEC] who receives a request from any carrier who meets the definitional criteria in Section 259(d)."[205] RTC advises that "[s]ome state commissions, in an effort to avoid unnecessary paperwork, may ask that incumbents not file requests and simply deem them eligible on their own motion."[206] As a

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scheme similar to that in section 251.

[199] NCTA Comments at 7.

[200] NCTA Reply Comments at 9 n.33.

[201] US West Comments at 12-13.

[202] PacTel Comments at 6.

[203] RTC Comments at 8 (also commenting that "it is unlikely that the issue of preemption will arise under Section 259 because of the distinctly separate spheres in which the FCC and states operate under the statute").

[204] USTA Comments at 11-12; RTC Comments at 8-9.

[205] USTA Comments at 11.

[206] RTC Comments at 8.

matter of statutory construction, USTA argues that "the specific language of Section 259(d) . . . should control over the more general language in Section 259(a)."[207]

c. **Discussion**

81. We encourage parties to bring disputes over section 259 agreements to the Commission. We decline to adopt particular rules to govern disputes between parties to section 259 agreements. First, because our negotiation-driven approach in implementing section 259 grants significant flexibility to parties, we expect that the parties themselves will be able to anticipate most difficulties and disputes and provide for routine means to resolve them. Second, it is predictable that the ability of parties to infrastructure sharing agreements to anticipate, and provide for, various contingencies will improve as more and more section 259 agreements are negotiated. Third, in the event of particular failures to anticipate or resolve disputes, our declaratory ruling and complaint processes are available. We expect that parties will routinely make good faith efforts to resolve disputes among themselves before availing themselves of formal or informal adjudication -- or arbitration -- before the Commission. Pursuant to our concerns about the proper scope of section 259 agreements,[208] and the section 251 rights of non-qualifying competitive LECs,[209] we also expect that carriers will utilize these same processes to bring to our attention any unlawful anticompetitive effects resulting from section 259-negotiated agreements.

82. On the question of the proper relative roles of the Commission and the states, we conclude that (1) section 259 directs the Commission to promulgate rules concerning *any* public switched network infrastructure, technology, information, and telecommunications facilities and functions, regardless whether they are used to provide interstate or intrastate services or, more commonly, both, and that (2) the states may accept filings pursuant to subsection (b)(7) and may designate eligible telecommunications carriers under subsection (d)(2). NCTA, RTC, and US West agree with the Commission's observation in the NPRM that section 259(a) grants the Commission authority to create rules to implement section 259 and that section 259 pertains to both interstate and intrastate communications. The remaining commenters who address jurisdiction assert that the Commission, in the NPRM, proposes to restrict impermissibly the role of the states in section 259 matters in contravention of sections 2(b), 261(b), and 261(c) of the Communications Act.[210] These parties essentially argue that there is no justification for the Commission to usurp the role of the states in regulating intrastate services and, to the extent that

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[207] USTA Comments at 12.

[208] *See* Discussion at Section III. B. 1., *supra*, at ¶ 50.

[209] *See* Discussion at Section III. B. 1., *supra*, at ¶ 59.

[210] 47 U.S.C. § 152(b). *See, e.g.*, USTA Comments at 10; GTE Comments at 12; PacTel Comments at 5-6. *See also* Oregon PUC Comments at 3 (arguing that states retain jurisdiction over terms and conditions of contracts for intrastate facilities and functions).

qualifying carriers, for example, are utilizing section 259 agreements in order to provide intrastate services, the Commission may not regulate such services or agreements absent a showing that meets the standards set out in *Louisiana PSC*.[211]

83. We believe that section 259 must be interpreted as encompassing all network infrastructure sharing agreements, regardless of whether the shared infrastructure is to be used to provide solely interstate services, or intrastate services as well. The language of the section makes no explicit distinction between interstate and intrastate matters, and certain aspects of section 259 suggest that no such distinction was intended. First, we note that subsection (b)(3) provides that the Commission's rules shall ensure that LECs subject to section 259 obligations "will not be treated by the Commission *or any State* as a common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section."[212] States have no authority to regulate interstate services in any event. Thus, if section 259 is read as addressing only interstate matters, this reference to state regulation would be superfluous. This provision makes sense only when read in the context of a provision that addresses both interstate and intrastate matters -- the Commission is directed to adopt rules that prevent states from regulating (in a way that they otherwise might) the sharing of infrastructure used to provide, *intra alia*, intrastate services as common carriage.

84. Second, the tie between section 259 and the universal service provisions of the Act also supports a conclusion that section 259 encompasses both interstate and intrastate matters. A carrier qualifies for section 259 infrastructure sharing only if it "offers telephone exchange services, exchange access, and any other service that is included in universal service."[213] Thus, we conclude that at least one purpose of section 259 is to advance the Act's universal service goals. Given the conditions on qualification, it is logical to conclude that the infrastructure obtained pursuant to section 259 may be used to provide "telephone exchange services, exchange access, and any other service that is included in universal service." Since telephone exchange service is essentially a local service, the scope of section 259, thus, encompasses both intrastate and interstate services.

85. Section 2(b) does not alter this conclusion. Section 2(b) is a rule of statutory construction and as such applies only where the authority-granting statutory provision in question is ambiguous.[214] But there is nothing ambiguous about the authority-granting provisions in

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[211] *See, e.g.*, USTA Comments at 11 ("Whether preemption is justified will depend on the specific facts and circumstances involved, and whether they meet the test of *Louisiana PSC*.").

[212] 47 U.S.C. § 259(b)(3) (emphasis added).

[213] 47 U.S.C. § 259(d)(2).

[214] 47 U.S.C. § 152(b) ("[N]othing in this Act shall be *construed* . . . to give the Commission jurisdiction with respect to [matters relating to intrastate communications services]." (emphasis added)).

section 259.[215] As explained above, section 259(a) must be read to direct the Commission to implement the requirements of section 259, without any distinction between interstate and intrastate matters.

86. Even if section 2(b) were applicable in construing section 259, we note that the network infrastructure addressed by section 259 can be used to provide both interstate and intrastate services. As US West aptly observes, there "is no reasonable way to separate these facilities at the level of the transaction between the qualifying carrier and the [providing] incumbent LEC."[216] We agree with this analysis, and believe that, because of the inseverability, Commission regulation under section 259 is particularly warranted.

87. Moreover, we do not believe that section 261 affects the Commission's jurisdiction in this case. Section 261(b), on its face, applies only to states enforcing regulations prescribed prior to the enactment of the 1996 Act or to states regulations prescribed after said date "if such regulations are not inconsistent" with 1996 Act provisions. We hold, in this Report and Order, that the rules adopted herein apply only to section 259 agreements, *i.e.*, those that are negotiated prospectively. By definition, state regulation that governed any previously negotiated intercarrier agreements would not apply since these agreements fall outside the scope of section 259. Section 261(c), on its face, applies only to affirm certain state regulation of intrastate services "that are necessary to further competition in the provision of telephone exchange service or exchange access . . .," and we have held here that section 259 is a "limited and discrete provision" designed to promote universal service by carriers who are not, by and large, competing with one another.

88. We affirm our tentative conclusion in the NPRM that the Commission has authority to create rules to implement the section, as it relates to both interstate and intrastate matters. Section 259(a) states that "*The Commission* shall prescribe, within one year after the date of enactment of the Telecommunications Act of 1996, regulations that require . . ." infrastructure sharing.[217] Similarly, Section 259(b) refers to the terms and conditions of the regulations to be "prescribed by the Commission," and Section 259(d)(1) makes clear that the term "qualifying carrier" will be defined "in accordance with regulations prescribed by the Commission pursuant to this section."[218] This language emphasizes the agency's already expansive general rulemaking powers, under sections 4(i) and 201(b). States generally are not empowered to implement the Communications Act, and nothing in section 259 suggests otherwise here. The only references to the states in section 259 concern the filing of agreements for public inspection, and the designation of "eligible" carriers pursuant to section 214(e) as part of the

[215] In addition, we note that section 201(b) clearly grants the Commission authority to "prescribe such rules and regulations" for all of "the provisions of this Act." 47 U.S.C. § 201(b).

[216] US West Comments at 13.

[217] 47 U.S.C. § 259(a) (emphasis added).

[218] 47 U.S.C. § 259(b), (d)(1).

determination of who is a "qualifying" carrier under section 259. Section 259 emphasizes the role of the Commission, not the states.

89. Of course, this does not alter the states' authority to regulate the common carrier services provided by providing incumbent LECs and qualifying carriers. Intrastate services that make use of "public switched network infrastructure, technology, information and telecommunications facilities and functions" obtained pursuant to section 259 will be regulated by the states, just as interstate services will be regulated by the Commission. Nothing in our analysis above should be construed as establishing an intent to regulate intrastate services, as opposed to regulating agreements regarding the sharing of "public network infrastructure, technology, information and telecommunications facilities and functions" under section 259(a). Our conclusions regarding a limited role for the states only apply to the terms under which qualifying carriers negotiate and obtain section 259 agreements.

C. Terms and Conditions Required by Section 259(b)

1. Section 259(b)(1)

a. Background

90. Section 259(b)(1) provides that the Commission shall not adopt regulations that would "require a local exchange carrier to which this section applies to take any action that is economically unreasonable or that is contrary to the public interest."[219] In the NPRM, we sought comment on what standard should be established for determining whether an action is economically unreasonable or not in the public interest. We tentatively concluded that no providing incumbent LEC should be required to develop, purchase, or install network infrastructure, technology, facilities, or functions solely on the basis of a request from a qualifying carrier to share such elements when such incumbent providing incumbent LEC has not otherwise built or acquired, and does not intend to build or acquire, such elements. We sought comment on whether an action could be considered economically unreasonable even if the requesting carrier agreed to pay the costs associated with the request. We tentatively concluded that a sharing request would be considered economically unreasonable if the terms proposed by the qualifying carrier were such that the providing carrier would incur costs that it could not recover. Finally, we sought comment on whether a providing incumbent LEC may withdraw from a sharing agreement if it later determines that such agreement is no longer economically reasonable.[220]

b. Comments

[219] 47 U.S.C. § 259(b)(1).

[220] NPRM at ¶ 20.

91. Many commenters claim that the Commission should set forth only general guidelines for determining what is "economically unreasonable or not in the public interest."[221] GTE claims that this standard is "not susceptible of precise definition . . . [and thus] the Commission should not add further details to its rules."[222] USTA argues that overly detailed standards could frustrate negotiated resolution of this issue.[223]

92. ALLTEL urges that the Commission, either by specific example or through general guidelines, indicate the types of actions which are economically unreasonable under section 259(b)(1).[224] Several commenters argue that the term "economically unreasonable" requires that providing carriers not be required to share infrastructure at below-cost rates.[225] GTE and PacTel claim that Congress intended that sharing agreements exist only where the providing LEC is not financially harmed and the agreement is cost-effective.[226] GTE argues that not allowing a providing LEC to recover its common costs or a return on its investment is by definition economically unreasonable and unconstitutional.[227] Southwestern Bell suggests that the test for determining whether an agreement is economically unreasonable should be that agreements must use fewer resources than would be required for both firms to provide the infrastructure separately, and providing LECs must be fully compensated for costs associated with sharing.[228] RTC claims, however, that, although it would be unreasonable to require a providing LEC to incur expenses which it could not recover, an incumbent's inability to earn a "fair" return on its investment with a requesting carrier because of competitive market conditions does not thereby excuse the providing LEC from its section 259 obligations.[229] MCI argues that the Commission should apply its Part 51 standard of technical feasibility so long as the facilities would be included under section 251(c)(2)(A).[230] The Oregon PUC contends that the Commission should make clear that

[221] *See, e.g.*, GTE Comments at 14; USTA Comments at 15; NYNEX Comments at 13; BellSouth Comments at 11.

[222] GTE Comments at 14.

[223] USTA Comments at 15.

[224] ALLTEL Comments at 4.

[225] *See, e.g.*, ALLTEL Comments at 4; PacTel Reply Comments at 5; GTE Comments at 14; BellSouth Comments at 11.

[226] PacTel Comments at 3-4; GTE Comments at 14.

[227] GTE Reply Comments at 8.

[228] Southwestern Bell Comments at 10-11 (relevant costs include a reasonable return on capital and risk premium, and the opportunity costs of engaging in infrastructure sharing).

[229] RTC Comments at 10.

[230] MCI Comments at 7.

carriers should not have to incur costs that they cannot recover, but that any calculation of rates for intrastate facilities remains under states' ratemaking authority.[231]

93. Many carriers support the Commission's tentative conclusion that section 259 does not require a providing LEC to construct and share facilities that it neither currently owns, nor plans to own.[232] MCI, however, argues that, as long as a providing LEC is compensated for the additional costs plus a reasonable profit, the providing LEC should be required to build facilities to satisfy section 259 requests.[233]

94. Several commenters claim that section 259(b)(1) permits a providing LEC to discontinue an infrastructure sharing agreement if it becomes economically unreasonable.[234] USTA claims that the Commission could require "a minimum of sixty days notice prior to discontinuing any infrastructure sharing arrangement."[235] ALLTEL argues that providing carriers should not be required to provide infrastructure under section 259 where the qualifying carrier either offers, or may be required to offer, those services obtained under an infrastructure sharing agreement for resale.[236] ALLTEL also argues that smaller carriers should not be burdened with infrastructure sharing requests from neighboring LECs who are able, but not willing, to deploy their own technology.[237] Southwestern Bell claims that the Commission should not foreclose a providing LEC from refusing a request for sharing based on public interest grounds.[238]

c. Discussion

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[231] Oregon PUC Comments at 3.

[232] *See, e.g.*, USTA Comments at 15-16; Ameritech Comments at 6 (sharing implies facilities that already exist); GTE Comments at 13; ALLTEL Comments at 4; BellSouth Comments at 11; PacTel Comments at 13; NYNEX Reply Comments at 10 (should be left to negotiation and subject to possible Commission intervention, *e.g.*, the Commission's complaint process as necessary).

[233] MCI Comments at 7; MCI Reply Comments at 6; *but see* USTA Comments at 15 (no requirement even where qualifying carrier agrees to pay costs).

[234] *See, e.g.*, USTA Comments at 17; ALLTEL Comments at 4; GTE Comments at 14; BellSouth Comments at 12.

[235] USTA Comments at 17; *see also* GTE Reply Comments at 8 (the Commission need not adopt a mandatory termination standard).

[236] ALLTEL Comments at 3-4 (section 259 agreements should sunset at such time as either the qualifying carrier's service territory becomes subject to competition or where the qualifying carrier uses section 259 facilities to compete outside its service territory with the providing incumbent LEC).

[237] ALLTEL Comments at 3.

[238] Southwestern Bell Comments at 11.

95. Section 259(b)(1) provides that the Commission not require a LEC to take any action in satisfying a request for infrastructure sharing that is economically unreasonable or that is contrary to the public interest. We affirm our tentative conclusion that section 259(b)(1) thus requires that the terms proposed by the qualifying carrier are such that the providing incumbent LEC does not incur costs that it cannot recover. We conclude that such a requirement will encourage and facilitate infrastructure sharing arrangements because such LECs will be assured the ability to recover their investment. We also conclude that the requirement that shared infrastructure not be used to compete against the incumbent LEC in its telephone exchange area will encourage such LECs to reach satisfactory agreements.[239] As discussed at Section III. A., *supra*, an incumbent LEC considering a request to share infrastructure does not face the disincentive (*e.g.*, loss of market share in its telephone exchange area) that is present in the competitive situations in which section 251 applies. We also note that a qualifying carrier is able to demand an infrastructure sharing agreement *per* section 259(a). Moreover, in the specific circumstances in which section 259 applies, we believe that the unequal bargaining power between qualifying carriers, including new entrants, and providing incumbent LECs is less relevant than it is in the more general competitive situation since the incumbent LEC has less incentive to exploit any inequality for the sake of competitive advantage. We thus conclude that the negotiation process should be permitted to proceed with only limited Commission regulation.

96. We also affirm our tentative conclusion that no incumbent LEC should be required to develop, purchase, or install network infrastructure, technology, facilities, or functions solely on the basis of a request from a qualifying carrier to share such elements when such incumbent LEC has not otherwise built or acquired, and does not intend to build or acquire, such elements. We agree with the comments of USTA and other parties that providing LECs should not be required to build or acquire such elements merely because a qualifying carrier agrees to pay the costs. Commenters have also not shown that there would exist any scale and scope benefits in situations where the providing carrier did not also use the facilities. Of course, parties are free to agree to such an arrangement if both sides determine it is in their best interests. We note, however, that, because providing LECs' networks may not be designed to provide the broad range of infrastructure sharing required by the language of section 259, providing incumbent LECs may be required to engage in some modifying of their network to accommodate sharing requests for existing infrastructure. In negotiating such build-out requirements, parties should be guided by the circumstances of the particular case and by the similar requirements in the Commission's local competition rules concerning build-out requirements for interconnection and unbundling requests.[240] In the *Local Competition First Report and Order*, the Commission stated that "LEC networks were not designed to accommodate third-party interconnection or use of network elements" and that "[i]f incumbent LECs were not required, at least to some extent, to adapt their facilities to [permit] interconnection or use by other carriers, the purposes of sections 251(c)(2)

[239] *See* Discussion at Section III. C. 6., *infra*.

[240] *Local Competition First Report and Order*, 11 FCC Rcd at 15605.

and 251(c)(3) would often be frustrated."[241] We also conclude that section 259 could be similarly frustrated and that, for section 259 requests, providing incumbent LECs must make such network modifications as are necessary to implement infrastructure sharing arrangements.

97. We also conclude that providing LECs should be permitted to withdraw from section 259 infrastructure sharing agreements if the arrangement subsequently becomes economically unreasonable or not in the public interest. We believe, however, that providing incumbent LECs should bear the burden of proving to the Commission that an existing arrangement has subsequently become economically unreasonable or not in the public interest. We believe that it is appropriate to place this burden on the party seeking relief from the obligations of its contract. Moreover, we believe that the providing incumbent LEC will have greater control over and access to information that would support a claim that an agreement has become economically unreasonable. We also conclude that, if an arrangement become economically unreasonable or not in the public interest and thus requires a providing incumbent LEC to end an agreement, the providing incumbent LEC must be required to attempt to renegotiate the agreement prior to termination. Also, qualifying carriers should be given adequate notice to protect their customers against sudden changes in service. We agree with USTA that providing carriers should give qualifying carriers sixty days notice prior to termination. We believe that this result both protects qualifying carriers and their customers from sudden service disruptions and still allows providing carriers to terminate in a timely fashion uneconomic agreements. These conclusions notwithstanding, we expect that parties should address contingencies, including the possibility that particular arrangements might become economically unreasonable at a subsequent date, in their infrastructure sharing agreements.

98. Section 259(b)(1) ensures that providing incumbent LECs are given the opportunity to recover the costs associated with infrastructure sharing arrangements. We thus conclude that the rates agreed to by providing incumbent LECs and qualifying carriers for infrastructure available pursuant to section 259, may assist parties and the states to arrive at rates for similar elements in arrangements reached pursuant to section 251. We also believe that although the rates for individual elements obtained pursuant to section 259 may be probative of the costs incurred by a providing LEC in making infrastructure available, it may be that, depending on the circumstances, these rates may not correspond with the rates competitive carriers can obtain pursuant to section 251 agreements because, among other reasons, providing incumbent LECs may be recovering costs for specific elements via other terms in the agreement. Similarly, when a party to a section 259 agreement is negotiating or arbitrating an interconnection agreement pursuant to section 251, information about the technical arrangements of that party's section 259 agreement may facilitate negotiation and arbitration of the technical feasibility of interconnection, unbundling, and collocation issues in the section 251 context.

2. Section 259(b)(2)

[241] *Id.*

a. Background

99. Section 259(b)(2) allows the Commission to "permit, but . . . not require, the joint ownership or operation of public switched network infrastructure and services by or among such local exchange carrier and a qualifying carrier."[242] In the NPRM, the Commission noted that joint ownership of shared network infrastructure with a qualifying carrier thus appears to be one method by which a providing LEC may meet many of its sharing obligations under section 259, assuming the qualifying carrier agrees. We also tentatively concluded that providing LECs and qualifying carriers should be able to share the risk of development and/or purchase and installation of network infrastructure.[243] We further tentatively concluded that, in the absence of evidence that there are problems in making these arrangements, we should let the participating carriers develop terms and conditions through their own negotiations. We proposed to treat the joint owners as the providing incumbent LEC for the purposes of our infrastructure sharing regulations. We sought comment on the implications of sharing and joint ownership for those carriers subject to the Commission's cost accounting rules. We also sought comment on whether joint ownership of technology, information, and telecommunications facilities and functions, specifically listed in section 259(a) but not included in section 259(b)(2), is permitted. Finally, we sought comment on methods for infrastructure sharing other than joint ownership that might satisfy the requirements of section 259.[244]

b. Comments

100. The majority of commenters expressly agree with the Commission's tentative conclusion that joint ownership arrangements are one means of meeting section 259 sharing obligations, and that, in the absence of evidence that there are serious problems, participating carriers should be both allowed and encouraged to develop terms and conditions through their own negotiations.[245] GTE urges the Commission not to specify particular methods of infrastructure sharing that satisfy section 259 and explains that, "because each qualifying and providing LEC will have different network architectures and needs," any mutually agreed-to arrangement, including but not limited to joint ownership, should be presumed to comply."[246] MCI states that the Commission may leave the terms of joint ownership to negotiation by the parties.[247] RTC suggests that agreements similar to those described in section 259 have long been

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[242] 47 U.S.C. § 259(b)(2).

[243] NPRM at ¶ 21.

[244] *Id.*

[245] *See, e.g.*, GTE Comments at 15; RTC Comments at 10; PacTel Comments at 9.

[246] GTE Comments at 15. GTE generally urges the Commission to adopt rules that simply repeat the statutory language for each provision within subsection (b). GTE Reply Comments at 6-7.

[247] MCI Comments at 8.